Award No. 4098

Docket No. 3882

2-UT-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 121, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. — C. I. O. (CARMEN)

THE UNION TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Edward Perry, Coach Cleaner, was unjustly suspended August 25, 1960 and unjustly dismissed August 29, 1960, from the service of The Union Terminal Company at Dallas, Texas.

2. That accordingly, the Carrier be ordered to restore the aforesaid employe to service with all rights unimpaired and paid for all time lost retroactive to and including August 25, 1960.

EMPLOYES' STATEMENT OF FACTS: Edward Perry, hereinafter referred to as the claimant, was employed by The Union Terminal Company, hereinafter referred to as the carrier, as a Coach Cleaner October 11, 1945. On Friday, August 19, 1960, claimant was involved in an altercation with Machinist W. G. Cannon at about 8:20 P. M. during claimant's tour of duty. Claimant is not a regular assigned Coach Cleaner, but works from the furloughed list. The carrier's mechanical foreman filed charges against the claimant under date of August 20, 1960.

"1. Claimant was under the influence of intoxicants.

2. Claimant cursed and inflicted personal injury upon Machinist W. G. Cannon while on Company property and on duty as Coach Cleaner about 8:20 P. M., Friday, August 19, 1960.

3. Failure to properly perform his duties after 8:20 P. M. on that date."

Carrier set date for investigation at 9:00 A. M., Tuesday, August 23, 1960.

On August 21, 1960, Local Chairman Jones addressed a letter to Mr. M. H. Cox, Mechanical Foreman, requesting that the investigation be postponed until Thursday, August 25, 1960.

first time anyone in authority had been able to positively identify the smell of intoxicants while claimant was on duty.

The facts developed in the investigation concerning claimant's violence caused us to inquire as to his criminal record. He has a record which makes us wonder why he has not been confined to a penal institution continuously during the last several years. We do not know claimant's status now, but understand on good authority that he will be prosecuted to the extent permissible by law for his attack on Mr. Cannon.

The Carrier offered to make Mr. Perry's police record available to petitioner's general chairman. We were not then and are not now at full liberty to publish his record. If petitioner has made a proper investigation in that connection, we assure your Board that they found claimant has a record of at least six skirmishes with the law within the last four years, involving drunkenness and acts of violence.

Rather than seek claimant's reinstatement, petitioner should realize that it was fortunate for their other constituents on this property, for the carrier, and the public interest that claimant was removed from the property before his violence cost someone his life.

The carrier respectfully submits that claimant was given a proper investigation and proven guilty of the very serious charges against him. We further submit that this matter should be dismissed for the reasons shown in Part I hereof. If for any reason the case is not dismissed, we respectfully request that the claim be in all respects denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant Edward Perry was employed by the Carrier as a Coach Cleaner at Dallas, Texas. On August 19, 1960, he was assigned to drive an ice tractor during his regular working hours. When he began his shift at 3:00 P. M., it was found that the tractor normally used for icing was out of order and had to be repaired. As a result, the Claimant was told by Coach Yard Foreman M. J. Williamson to use an electrician's tractor until the necessary repairs were made. At about 8:20 P. M. the Claimant returned the electrician's tractor and got on the ice tractor which by now had been repaired by Machinist W. G. Cannon. The Claimant started the tractor, drove it a short distance, and then left it without shutting off the motor. Cannon, who was standing nearby, asked him where he was going and told him the tractor should not be left idling. Cannon also told the Claimant to come back and shut the motor off. An argument ensued between the Claimant and Cannon, the content of which is in dispute. But it ended with the Claimant thrusting an ice pick at Cannon's stomach. The latter, whose left arm was in cast because of a broken wrist, attempted to deflect the ice pick with his right arm. The ice pick hit Cannon's right arm, causing a slight injury which required medical treatment. Cannon did not fight back, but ran to the shop. The Claimant also ran away. Foreman

Williamson, who had observed the incident from close proximity, shouted at him to come back. The Claimant did not stop and was not found until about 9:00 P. M., when he was arrested by a police officer.

The Carrier charged the Claimant with having (a) been under the influence of intoxicants, (b) cursed and inflicted physical injury upon Cannon, and (c) failed properly to perform his duties after 8:20 P. M. on the day in question.

After a formal hearing, the claimant was suspended from service and subsequently dismissed therefrom, effective as of August 29, 1960. He filed the instant grievance in which he requested reinstatement with all rights unimpaired and compensation for all time lost. The Carrier denied the grievance which is now before us for adjudication.

1. An employer's premises are a place for the peaceful performance of work. They are not a battleground. Fighting on the premises generally runs counter to the elementary requirements of plant efficiency, discipline, and safety. The employer's right to invoke disciplinary penalties, including dismissal, against the guilty party is, therefore, beyond doubt. However, the fact that an employe was involved in such a fight does not in itself subject him to a disciplinary penalty unless it can be established that he was the aggressor or unless conflicting evidence does not permit identification of the aggressor. Moreover, an act of aggression does not consist of actual physical violence alone, but may also involve insulting or threatening remarks or actions which can reasonably be expected to start a fight. See: Lawrence Stessin, **Employee Discipline,** Washington, D. C., BNA Incorporated, 1960, pp. 90-96 and cases cited therein.

In applying the above principles to the facts underlying the case at hand, we have reached the following conclusions:

The Claimant contends that he was insulted and provoked by Cannon and solely acted in self-defense when he threw the ice pick at him. The evidence on the record considered as a whole does not sustain the Claimant's contention. On the contrary, the available evidence convincingly proves that it was the Claimant who used insulting language, and not Cannon. The record also discloses beyond doubt that Cannon, who was partly disabled because of a cast on his left arm, neither physically attacked the Claimant nor threatened him in a way which could reasonably be regarded by the Claimant as an imminent physical assault upon him.

In summary, we find that the Claimant attacked Cannon with a dangerous weapon without first being physically attacked or provoked by the latter. Consequently, it cannot possibly be said that the Claimant acted in justifiable self-defense.

2. It is true, as submitted by the Claimant, that he was acquitted of a charge of aggravated assault with a deadly weapon by a jury in the Dallas County Criminal Court. However, the verdict of the jury is not binding upon us. Section 3, First (i) of the Railway Labor Act confers upon us exclusive primary jurisdiction to decide disputes arising out of grievances on the basis of all the evidence before us. See: Slocum v. Delaware, Lackawanna & Western Railroad Co., 339 U. S. 239; 70 S. Ct. 577 (1950); Brotherhood of Railroad Trainmen v. Chicago, River and Indiana Railroad Co., 353 U. S. 30; 77 S. Ct. 635 (1957); Pennsylvania Railroad Co. v. Day, 360 U. S. 548; 79 S. Ct. 1322 (1959).

3. The law is well settled that a disciplinary penalty imposed by a Carrier upon an employe can be challenged before this Board only on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion. See: Awards 3874 and 4000 of the Second Division. The Claimant's dismissal was not founded upon such illogical or unreasonable motives. He was the aggressor and his dismissal was a reasonable exercise of managerial discretion. He was dismissed from the Carrier's service for just and sufficient cause within the contemplation of Rule 16(a) of the applicable labor agreement.

4. Since we are satisfied that the instant grievance is without merit for the reasons stated above, it becomes unnecessary to rule on the Carrier's further charges as well as on its procedural objections and we express no opinion on the validity thereof.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December, 1962.